what he was supposed to declare could not be maintained on the evidence.

The third reason given by the learned trial magistrate was that proof of the respondent's previous convictions was not properly adduced without the production of three certificates under the provisions of section 399 of the Criminal Procedure Code. I am unable to find in this particular section any requirement for this proposition. All that the prosecution has to do is to prove that a copy thereof had been delivered to the accused within the time stipulated in the proviso. Until this has been done, the report cannot be received in evidence: see *Chong Peng* v. *Public Prosecutor* [3] and *Public Prosecutor* v. *Ng Fah,*[4] and *Mallal's* Criminal Procedure, 4th Edition, page 565-567. But when this has been done, the report becomes receivable in evidence.

The learned trial magistrate further appeared to have been concerned with the difference between the name of the respondent appearing on Form G and the name in the form CR. 6A, where it was spelt "Munusamy s/o Aragovindah." The two spellings are obviously phonetic rendering in Roman characters of the same name, but if there is any doubt in the matter, there is the clear coincidence of the respondent's identity card numbers (both old and new) in both the application Form G and the form CR. 6A. It does not appear to me that the learned trial magistrate has any cause for concern. In any event, it was open to the respondent to refuse service of any CR. 6A form if it did not relate to him or to avail himself of the provisions of section 399 of the Criminal Procedure Code to call the registrar of criminals to establish that he was not the person concerned.

For these reasons, the acquittal and discharge cannot stand. The charge should be amended to come within the 1964 Rules and the defence should be given the right to recall any witnesses for further cross-examination on the amended charge — section 162 of the Criminal Procedure Code. This may not be so satisfactory to the defence as a trial *de novo*. Coupled with this is the fact that the learned trial magistrate has since gone on transfer. I am, therefore, of the opinion that in the interest of justice, the proper order would be a retrial before another magistrate.

The prosecution will have the responsibility of framing a proper charge. When it comes to do so, I trust that the prosecution will pay regard to the fact that under the Penal Code "the making of any number of false statements in the same deposition is one aggregate case of giving false evidence and charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition," *per* Jenkins C.J. and Mookerjee J. in *Laha* v. *Emperor.*[5] This decision should, in my view, apply to the instant case. Perhaps, too, the prosecution will consider this passage in the light of what I had said about the claim to be of good character. Further, the charge will have to have incorporated in it the word "knowingly" to bring it within section 16(1) of the 2nd Schedule of the Constitution of Malaysia.

The appeal is allowed. The order of acquittal and discharge is set aside and a retrial ordered before another magistrate on a charge to be framed under the Citizenship Rules, 1964, as amended.

Appeal allowed.
Retrial ordered.

Solicitors: *Yeoh Kian Teik & Co.*

ISMAIL & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) January 19, 1967]

[Singapore — Federal Court Criminal Appeal No. Y10 of 1966]

Criminal Law and Procedure — Identification parade — Evidence of non-identification of accused persons at identification parade given at preliminary inquiry — No such evidence given at trial — Whether appellate court entitled to take such evidence into consideration.

The appellants had been convicted of charges of wrongful confinement and robbery. At the preliminary inquiry evidence was given of the holding of an identification parade at which certain witnesses failed to identify either of the accused. This evidence was not given at the trial.

Held: if the evidence of the non-identification had been given at the trial the verdict might well have been different, especially in view of the most unsatisfactory features of the trial and having regard to this evidence which the appellate court would in the circumstances take into account, the prosecution had failed to prove the guilt of the appellants beyond reasonable doubt and therefore the convictions and sentences must be set aside.

FEDERAL COURT.

Dato' David Marshall for the appellants.

Tay Soo Tee (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: The appellants were convicted in the High Court on the following two charges:—

1. That you (1) Ismail bin Jalil
(2) Ayob bin Sarip

on or about the 29th day of August 1965 at about 11.30 a.m. in front of No. 268 Bukit Timah Road, Singapore, in furtherance of the common intention of you both, did wrongfully confine one Tan Yew Lye in a motor-car No. SL. 9991, and thereby committed an offence punishable under section 342 read with section 34 of the Penal Code (Chapter 119).

2. That you (1) Ismail bin Jalil
(2) Ayob bin Sarip

are charged that you, on or about the 29th day of August, 1965, at about 11.30 a.m. along Cavenagh Road,

Singapore, in furtherance of the common intention of you both, committed robbery of cash $300 in the possession of one Tan Yew Lye, and at the time of committing the said robbery one of you was armed with a deadly weapon, to wit, a revolver, and thereby committed an offence punishable under section 392 and 397 read with section 34 of the Penal Code (Cap. 119).

They were each sentenced to one year's imprisonment on the first charge and eight years' imprisonment on the second charge, the sentences to run concurrently. They now appeal against their convictions and their sentences.

The facts in this appeal present some extraordinary and unusual features. Both appellants are detective police constables and both were on the 29th August 1965 attached to the Queenstown Police Station. On that day, a Sunday, at 3.45 p.m. one Tan Yew Lye, the complainant in the case, made a report at the Kandang Kerbau Police Station stating that at about 11.30 that morning while coming out of a shop with $500 which he had just collected from the shop he was approached by two Malays and asked for his identity card. He produced it after they had told him that they were from "Government Service." They then took his identity card and told him to follow them into a red Austin car No. SL. 9991. While he was in the car with them one of them checked his pocket and took $300 and at about 12.15 p.m. they dropped him off at Rochore Canal Road.

Inspector Steven Salay who was then on duty at the Kandang Kerbau Police Station, and to whom this report was immediately referred, ascertained who was the owner of the car SL. 9991 through the Registrar of Vehicle's Office and that same evening traced the owner and seized the car in question from the petrol kiosk at the junction of Joo Chiat Road and Joo Chiat Place.

The car had been hired out at 10.30 the same morning to two Malays who had come to the petrol kiosk to hire a car which they returned about two hours later. The car owner's assistant had written down in a note book the name and address of the hirer and the number of the driving licence produced by one of the two Malays. The number of the driving licence recorded was 16801/60. Inspector Steven Salay took possession of the note book and the car at about 9.55 p.m. that evening.

The following day this inspector held an identification parade at the Kandang Kerbau Police Station and the complainant picked out the first appellant. From the first appellant the inspector took possession of a duplicate driving licence issued to him and a revolver and muzzle cap and a pocket book. The entry in the first appellant's pocket book records that between 8.00 a.m. and 2.30 p.m. on the 29th of August 1965 he was at home. Inspector Salay checked this *alibi* and recorded statements from the first appellant's wife and mother.

On the 18th of September 1965 another inspector, Gurdev Singh, took over the investigation of the case but it was not until the 11th of October 1965 that the first appellant was brought before a court and charged. The following day Inspector Gurdev Singh arrested the second appellant and held an identification parade at the Geylang Police Station at which the complainant picked out the second appellant.

At the trial the complainant testified that having been sent by his employer Ng Cheng Kang he went on his motor cycle to a shop Chop Gee Chang in Bukit Timah Road to collect some money. On arrival at that shop he parked his motor cycle on the roadside next to the pavement, went into the shop, saw the proprietor Tan Choon Kiat, identified himself to the proprietor and was given $500 in $50 denominations to deliver to his employer. Having counted the money he put $300 in his right trousers pocket and $200 in his left hip pocket, left the shop and went to his parked motor cycle. He was pushing his motor cycle when two Malays, whom he did not know, walked towards him and asked for his identity card which he produced. The two Malays were the appellants in this case. The first appellant took his identity card, told him to park his motor cycle and to follow them. He asked their identity and they said they were "Government men". He followed them for some distance and was asked to get into a small red Austin car parked on the road. He got in, sat at the rear off-side of the car with the second appellant on his left, the first appellant took the driver's seat and drove the car away. The car turned into Cavenagh Road and slowed down and at this stage the second appellant searched his body, felt his right trousers pocket, asked him what were the contents of that pocket and on being told it was money tried to put his hand into that pocket. When the complainant prevented him from doing so, the first appellant took out a gun, put it on the roof of the dashboard and told him in Malay to sit quietly. Then the second appellant put his hand into the complainant's right trousers pocket and took out the money in it and put it into his own shirt pocket. The complainant then asked the appellants why they were taking him with them and was told that he was being arrested under section 55. The complainant understood that a gangster could be detained under section 55. The car then proceeded along Clemenceau Avenue, Havelock Road, Chulia Street, Cecil Street, Robinson Road, Stamford Road and Rochore Canal Road where the car stopped and the complainant was handed back his identity card and told to get out and not to make a report of this incident. This was at about 12.00 noon. After the complainant had alighted from the car it drove off but he noted down its number which

was SL. 9991. He then got into a taxi and went to Bukit Timah Road where he recovered his motor cycle and rode on it back to his employer's shop. On arrival at the shop he handed over the remaining $200 and it was only after he was asked why he had handed over only $200 that he told his employer that he had been robbed of the other $300 and related to his employer what had happened. His employer advised him to have some food first before going to make a report. He explained that he did not make a report as soon as he got out of the Austin car because he was then very frightened. After his meal he again recounted the robbery to two persons who came into the shop and they advised him to report the matter to the police. He then went to the Kandang Kerbau Police Station with these two persons. The report was made at 3.45 p.m. The next morning at the Kandang Kerbau Police Station he identified at an identification parade the first appellant as the driver of the car and the one who produced the gun. On the 12th of October 1965, i.e. six weeks later at the Geylang Police Station he identified the second appellant at an identification parade as the one who took the $300 from his pocket.

The owner of the Austin car SL. 9991 Chng Lian Kay testified that on the 29th August 1965 he was at the petrol kiosk at the junction of Joo Chiat Road and Joo Chiat Place with his assistant Wee Tew Kai when two Malays came to hire a car. He told his assistant to note down particulars of the driving licence of one of them and after this had been done they drove away a Mini Austin car which they subsequently returned at 12.45 p.m.

Wee Tew Kai testified that at 10.30 a.m. on 29th August 1965 he was at the petrol kiosk when Chng Lian Kay came in which two male Malays and instructed him to write down particulars from a driving licence which he did. He then handed the licence back to one of the Malays who took away car SL. 9991. Neither he nor Chng Lian Kay was able to identify either of the appellants at the trial.

The relevant particulars contained in the note book were as follows:—

"29/8/65 16801/60

ISMAIL B JALIL
37 GEYLANG RD
18/9/65
10.30 A.M. TO 12.45 P.M. $4"

The driving licence of the first appellant which was seized by Inspector Salay was a duplicate driving licence which duplicate had been obtained by the first appellant on application made on the 23rd of August 1965. When first issued it entitled the first appellant to drive only vehicles of class 2 i.e. motor cycles but on the same day the first appellant obtained a provisional driving licence enabling him to drive vehicles of class 3 i.e. motor cars. Two days later on the 25th August 1965 the first appellant was tested and found competent to hold a driving licence to drive vehicles in class 3 and an endorsement to that effect was accordingly made in this duplicate driving licence. The licence number appearing in the driving licence is S. 16081/60.

On the application form submitted by the first appellant for the duplicate driving licence there appears a declaration by the first appellant to the effect that the original licence No. S. 16081/60 had been destroyed and that the first appellant was licensed to drive vehicles in class 2.

Both appellants denied that they hired car SL. 9991 on the day in question and they denied taking part in the robbery which was committed in that car. They put forward *alibis* in support of their denials and called witnesses to support their *alibis*. As regards the duplicate driving licence the first appellant testified that he had lost the original licence and that under the original licence which he held he was licensed to drive motor cars as well as motor cycles. He produced a certificate of insurance issued by the Oriental Fire and General Insurance Company Ltd. to him as the policy holder, effective for the period 29th September 1964 to 1st December 1964 entitling the policy holder to drive motor car S. 4171. The evidence is that he owned this car which was a Borgward car and which he drove. While it is no doubt correct that the fact that the first appellant owned the motor car in 1964 is not conclusive proof that he held a driving licence authorizing him to drive motor cars, the probability is that a person in the position of the first appellant would not own a motor car unless he held a driving licence permitting him to drive motor cars.

The trial judge convicted both appellants and in his grounds of decision stated that he believed the complainant who impressed him as a truthful witness whose story he accepted as the truth of the matter. He rejected the testimony of both appellants and the witnesses called by them to support their *alibis* as in his opinion they were not speaking the truth.

The complainant's story was a most unusual one. It would appear that he was not robbed of the remaining $200 he carried on his person because he had split the $500 into two separate lots and had kept them in different pockets. His action in separating the $500 and keeping the separated notes in two pockets seemed unusual in the context of his evidence that he had a motor cycle and he was sent on an errand to collect a sum of money to bring it immediately back to his employer.

Another unusual feature was the fact that the two male Malays while they were all in the

car would rob him of $300 and not the entire $500 simply because he had the other $200 in another pocket.

Another unusual feature was the complainant's description of how the Malay who sat next to him and to his left managed to extract the $300 from his right trousers pocket apparently against his will. These three unusual features of the complainant's testimony in relation to the actual sum of money taken from him, in themselves, raised a doubt whether a robbery as related by him of the $300 in fact took place. The complainant's actions subsequent to his being so robbed raised more doubts. Instead of making an immediate report at the nearest police station of the fact that he had just been robbed by two persons driving a car of a conspicuous colour namely red, the number of which he had noted down, he proceeds to collect his motor cycle. He does not rush into the shop from where he had collected the money and tell the person who had handed him the $500 that he had been robbed of part of it but goes back to his employer's shop. There instead of immediately telling his employer that he had been robbed of part of the amount that he had been given to hand over to his employer he merely hands over the balance of that sum and it was only when he was questioned as to how much he had received that the story of the robbery was related by him to his employer. Again, thereafter, instead of making a report as soon as possible to the police he waits until nearly three hours later and in his report to the police he makes no mention of a gun being produced when the robbery was being committed.

Having regard to all these unusual and extraordinary features which were drawn to our attention by counsel for the appellants and to the fact that the *alibis* of both appellants were supported by witnesses we reserved judgment at the conclusion of the arguments.

We have again studied the record of the trial and the grounds of decision of the learned trial judge in detail and with considerable care and we are struck by the fact that there was no testimony at the trial as to whether or not the owner of car SL. 9991 and his assistant, both of whom saw and spoke to the two Malays who came to hire a car on the morning of the 29th August and both of whom saw the two Malays again when they returned the car two hours later, were asked to attend the identification parade held by Inspector Salay the following morning and to attend the identification parade held by Inspector Gurdev Singh on the 12th October.

It seemed to us inconceivable that these two experienced police officers, who were by then aware of the existence and whereabouts of these two witnesses, could have failed to call upon them to attend those two identification parades. We therefore called for the preliminary inquiry depositions and they disclose that all these four witnesses deposed that the owner of car SL. 9991 and his assistant attended these two identification parades but were unable to identify anyone in the parade.

Had the prosecution case depended on the evidence of the complainant alone we are of the opinion that no reasonable jury or judge trying the case without a jury would have convicted the appellants. It seems to us the evidence of the owner of car SL. 9991 and that of his assistant was a deciding factor that tipped the scales of justice against the appellants. The learned trial judge in his grounds of decision rejected the possibility that the complainant, assuming his story to be true, had been wrongfully confined and robbed in car SL. 9991 by two Malays, other than the two appellants, who having come into possession of the lost driving licence of the first appellant may have used it in hiring car SL. 9991 because the complainant had ample opportunity of observing the facial features of the two persons who robbed him.

The same if not more ample opportunities, in ordinary and not distressing circumstances, were had by the owner of the car and his assistant and yet neither of them could identify the appellants at the two identification parades. This uncontroversial fact and a fact of foremost importance to both appellants was not available to the learned trial judge. In our opinion had this fact been testified to at the trial the verdict might well have been different, having regard to the other unsatisfactory features we have earlier alluded to. We ourselves are satisfied, having regard to this uncontroversial fact, coupled with the evidence given at the trial, that this is a case where the prosecution have failed to prove the guilt of both appellants in respect of both charges beyond a reasonable doubt.

We are aware that we are treating as evidence a fact which was not testified to at the trial, without first invoking the provisions of section 61 of the Courts of Judicature Act 1964 but we are satisfied, having regard to the special circumstances of this particular appeal and the stage reached in the appeal proceedings that this is a proper case and in the interests of justice, for us to dispense with the formality of having this particular piece of additional evidence taken by us or by the trial court.

For all these reasons we would allow the appeals of both appellants and set aside the convictions and sentences.

Appeals allowed.